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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

9 || JOHNNY EDWARD HAMILTON,

Petitioner,

11 | VS.

12 | E. K. McDANIEL, et al.,

13 || Respondents.

Case No. 3:06-cv-00273-PMP-VPC

ORDER

15 The court of appeals remanded this action (#69) for the court to determine whether counsel
16 failed to consult with petitioner about a direct appeal. If no consultation occurred, then the court
17 needs to inquire whether that failure to consult was deficient performance by counsel and whether
18 petitioner was prejudiced.

On the issue, the Nevada Supreme Court held:

Finally, Hamilton contends that the district court erred in rejecting his claim that defense counsel was ineffective for failing to perfect an appeal on his behalf. After conducting an evidentiary hearing, the district court found that Hamilton was not deprived of his appellate rights. The district court's finding is supported by substantial evidence. In particular, defense counsel testified that Hamilton had informed him that he intended to pursue post-conviction remedies but did not express an interest in pursuing a direct appeal. Although Hamilton testified that he requested an appeal, the district court acted within its discretion in finding defense counsel's testimony to the contrary more credible. Accordingly, we conclude that the district court did not err in rejecting Hamilton's claim that counsel was ineffective for failing to file a direct appeal.

²⁶ Ex. 86, at 3 (#8) (emphasis added).

Subsequent to the decision of the court of appeals, two decisions of the Supreme Court of the United States affect this court's analysis. First, “[u]nder [28 U.S.C.] § 2254(d), a habeas court

1 must determine what arguments or theories supported or, as here, could have supported, the state
 2 court's decision; and then it must ask whether it is possible fairminded jurists could disagree that
 3 those arguments or theories are inconsistent with the holding in a prior decision of this Court."
 4 Harrington v. Richter, 131 S. Ct. 770, 786 (2011). The remanded claim is a claim of ineffective
 5 assistance of counsel. A petitioner claiming ineffective assistance of counsel must demonstrate (1)
 6 that the defense attorney's representation "fell below an objective standard of reasonableness,"
 7 Strickland v. Washington, 466 U.S. 668, 688 (1984), and (2) that the attorney's deficient
 8 performance prejudiced the defendant such that "there is a reasonable probability that, but for
 9 counsel's unprofessional errors, the result of the proceeding would have been different," id. at 694.
 10 That standard, by itself, is deferential. Richter, 131 S. Ct. at 788. The court's analysis becomes
 11 even more deferential when § 2254(d) applies.

12 When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The
 13 question is whether there is any reasonable argument that counsel satisfied Strickland's
 14 deferential standard.

15 Id.

16 Second, when reviewing the state-court decision under § 2254(d), this court is limited to the
 17 record that was before the state court. Cullen v. Pinholster, 131 S. Ct. 1388, 1400 (2011). This
 18 disposes of petitioner's request for an evidentiary hearing. Evidence that the court could obtain
 19 through an evidentiary hearing would have no effect upon the court's analysis.

20 The analysis of whether a defendant was denied a direct appeal due to ineffective assistance
 21 of counsel has four steps. First, has the defendant instructed counsel to file an appeal or asked not
 22 to take an appeal?

23 [A] lawyer who disregards specific instructions from the defendant to file a notice of appeal
 24 acts in a manner that is professionally unreasonable. . . . At the other end of the spectrum, a
 25 defendant who explicitly tells his attorney not to file an appeal plainly cannot later complain
 26 that, by following his instructions, his counsel performed deficiently.

27 Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). Second, if the defendant did not give instructions,
 28 has counsel consulted with the defendant about a direct appeal?

29 We employ the term "consult" to convey a specific meaning-advising the defendant about
 30 the advantages and disadvantages of taking an appeal, and making a reasonable effort to
 31 discover the defendant's wishes. If counsel has consulted with the defendant, the question of

1 deficient performance is easily answered: Counsel performs in a professionally unreasonable
 2 manner only by failing to follow the defendant's express instructions with respect to an
 appeal.

3 *Id.* at 478 (emphasis added). Third, if counsel did not consult with the defendant about the direct
 4 appeal, was that deficient performance by counsel?

5 [C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal
 6 when there is reason to think either (1) that a rational defendant would want to appeal (for
 example, because there are nonfrivolous grounds for appeal), or (2) that this particular
 7 defendant reasonably demonstrated to counsel that he was interested in appealing. In making
 this determination, courts must take into account all the information counsel knew or should
 have known.

9 *Id.* at 480 (citation omitted). Fourth, if the lack of consultation was deficient performance, was the
 10 defendant prejudiced? “[T]o show prejudice in these circumstances, a defendant must demonstrate
 11 that there is a reasonable probability that, but for counsel’s deficient failure to consult with him
 12 about an appeal, he would have timely appealed.” *Id.* at 484.

13 In the state habeas corpus proceedings, petitioner made little effort, if any, to prove that
 14 counsel failed to consult with him about a direct appeal. The briefs and the testimony at the
 15 evidentiary hearing focused on whether petitioner told counsel to file a direct appeal.

16 The state district court determined that petitioner did not tell counsel to file a direct appeal.
 17 Ex. 78, at 2 (#8). The Nevada Supreme Court affirmed the district court’s decision. Ex. 86, at 3
 18 (#8). This court held that the Nevada Supreme Court’s decision was a reasonable application of
 19 Flores-Ortega. The court of appeals affirmed this court’s holding. This answers the first question in
 20 the Flores-Ortega analysis.

21 The second question in the Flores-Ortega analysis, whether counsel consulted with petitioner
 22 about a direct appeal, must be taken in consideration with Harrington’s requirements for deference
 23 pursuant to § 2254(d)(2). Therefore, the question before this court is not whether counsel consulted
 24 with petitioner about a direct appeal. Instead, the question is whether petitioner has proven that
 25 there is no reasonable argument that counsel might have consulted with petitioner about a direct
 26 appeal. See Harrington, 131 S. Ct. at 788. The parties filed the supplemental answer (#76) and the
 27 supplemental reply (#79) after the Supreme Court decided Harrington. Respondents quoted the
 28 relevant rule from Harrington. However, petitioner argues that the evidence shows that counsel did

1 not consult with petitioner, meaning that counsel provided ineffective assistance. Petitioner does
2 not argue that the state court's determination was an unreasonable application of Flores-Ortega and
3 Strickland. Petitioner's argument overlooks the requirement that other reasonable arguments could
4 justify the state courts' decision. Harrington, 131 S. Ct. at 786.

5 The evidence on consultation that was adduced at the evidentiary hearing could reasonably
6 support a finding that counsel did consult with petitioner about a direct appeal. Counsel did have a
7 conversation with petitioner what to do after the state district court sentenced him. Ex. 77, at 9-10
8 (#8). Counsel's recollection was that petitioner wanted to proceed with post-conviction remedies.
9 Id. at 10 (#8). Counsel also testified about his standard practice at sentencing. When he opens a
10 criminal file, he places on the left side of the folder a memorandum that explains a defendant's right
11 to appeal after entry of the judgment of conviction. At sentencing, he removes the memorandum
12 from the file, writes the date and the defendant's name in a blank space on it, and gives it to the
13 defendant. Sometimes he states on the record that he is giving the memorandum to the defendant;
14 he did not make any such statement in this particular case. When counsel reviewed petitioner's case
15 file, the memorandum was not present, which indicated to him that he had given the memorandum
16 to petitioner. Id. at 11-12 (#8). Flores-Ortega does not require that consultation be verbal and face-
17 to-face, and the memorandum could have contained the necessary information for a consultation.
18 The actual contents of the memorandum are unknown. However, that lack of knowledge does not
19 mean that counsel failed to consult with petitioner about a direct appeal. It was petitioner's burden
20 in state court to prove either that counsel had not actually given petitioner the letter or that the
21 memorandum did not contain the information necessary to be a consultation within the meaning of
22 Flores-Ortega. Petitioner made no such effort in state court. In this court, it is petitioner's burden to
23 prove that there was no reasonable argument to support the Nevada Supreme Court's conclusion.
24 Instead, petitioner argued de novo reasons why counsel did not consult with petitioner. The Nevada
25 Supreme Court reasonably could have concluded that the memorandum was a consultation within
26 Flores-Ortega's meaning of the term.

27 Having determined that the Nevada Supreme Court reasonably could have concluded that
28 counsel consulted with petitioner about a direct appeal, the question becomes whether counsel

1 ignored petitioner's express instructions with respect to an appeal. Flores-Ortega, 528 U.S. at 478.
2 The state courts determined that petitioner gave no express instruction to appeal the judgment of
3 conviction, and both this court and the court of appeals have held that that determination was a
4 reasonable application of Flores-Ortega. Consequently, the Nevada Supreme Court reasonably
5 could have determined that counsel did not perform deficiently, and that petitioner was not deprived
6 of a direct appeal.

7 Given that the Nevada Supreme Court reasonably could have concluded that counsel
8 consulted with petitioner and that counsel did not ignore express instructions from petitioner, it is
9 unnecessary for the court to determine whether counsel had a duty to consult with petitioner. It also
10 is unnecessary for the court to determine whether petitioner suffered any prejudice.

11 Reasonable jurists might find the court's conclusions to be debatable, and the court will
12 issue a certificate of appealability.

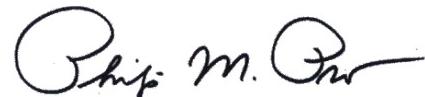
13 Petitioner has submitted a motion for decision (#80). The court's decision on the merits
14 moots the motion. However, the court wishes to note that it has been operating under a judicial
15 emergency and that it has cut staff. Counsel for petitioner has been experiencing the same
16 difficulties. The unfortunate effect is that the court might not be able to address petitions as quickly
17 as it otherwise would like.

18 IT IS THEREFORE ORDERED that the first amended petition for writ of habeas corpus
19 (#21) is **DENIED**. The clerk of the court shall enter judgment accordingly.

20 IT IS FURTHER ORDERED that a certificate of appealability is **GRANTED** on the issue
21 whether the Nevada Supreme Court reasonably could have concluded that counsel consulted with
22 petitioner about a direct appeal.

23 IT IS FURTHER ORDERED that petitioner's motion for decision (#80) is **DENIED** as
24 moot.

25 DATED: July 29, 2013.



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PHILIP M. PRO
United States District Judge